

**PRETRIAL AND TRIAL PROCEDURES**  
for civil cases before

**THE HONORABLE JACK SHERMAN, JR.**

United States Magistrate Judge  
Room 716 Potter Stewart U.S. Courthouse  
100 East 5th Street

Cincinnati, Ohio 45202

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A **civil** lawsuit in which you **either** represent a party, **or appear pro se**, has been assigned to this Court for **pretrial purpose and/or** trial. These procedures are designed to handle your case promptly and efficiently without impeding your ability to present **the** case fully and fairly. The following is an index of the subjects contained herein:

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The following pre-trial and trial procedures supplement the Local Rules for the Southern District of Ohio. (Those Rules are referred to hereinafter as S.D. Ohio L.R.\_\_. ) The parties are advised to read, and be familiar with, both these procedures and the Local Rules. Copies of the Local Rules may be obtained in the Clerk s Office free of charge. The Local Rules are also printed in West Publishing Company s Ohio Rules of Court: Federal available from West.

## I. CALENDAR ORDER

Shortly after the case is referred to the Magistrate Judge, counsel<sup>1</sup> will participate in a scheduling conference (**known as a Preliminary Pretrial Conference**) to determine convenient dates. **To save litigation costs, such conferences are conducted by telephone, so that counsel need not travel to the Court.** A Calendar Order will be issued immediately following the scheduling conference. The Calendar Order will **typically** include: (1) a deadline for amending the complaint to add parties; (2) a deadline for the completion of discovery; (3) a deadline for all dispositive motions; **and** (4) a date for the final pretrial conference **and trial.** **(In non-consent cases, some of these latter dates may be set, instead, by the presiding district judge.)** The filing of a motion for continuance, or any other motion, until ruled upon by the Court, will not modify the dates in the Calendar Order.

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<sup>1</sup> Although these procedural instructions use the term counsel, the Court recognizes the many cases in which litigants proceed pro se; that is, without the aid of counsel. These instructions apply with equal force to all litigants, whether or not they obtain counsel.

## **II. DISCOVERY**

The deadline for discovery will be set in the Calendar Order. Discovery requests must be made at such time that responses thereto are due before the discovery deadline. For example, if the time for response to a discovery request under the appropriate rule is 30 days, the discovery request must be made at least 30 days before the discovery deadline.

Motions to compel discovery responses due before the deadline will be entertained by the court after the deadline has lapsed. Pursuant to the Federal and Local Rules of Civil Procedure, the parties must exhaust all extrajudicial means of resolving discovery disputes before filing a motion to compel discovery.

Counsel may, by agreement, continue discovery beyond the deadline. In this case, no supervision of or intervention in the continued discovery will be made by the court unless there is a showing of extreme prejudice. No trial setting will be vacated as a result of information acquired in the continued discovery.

The filing of a dispositive motion does not toll the running of the discovery deadline. Discovery will not be stayed during the pendency of a dispositive motion unless there are exceptional circumstances.

### **1. Establishing the Discovery Deadline:**

**The discovery deadline will be set in the Calendar Order. The Court will not supervise the parties' discovery efforts after the discovery deadline.**

### **2. When Discovery Requests and Motions May Be filed:**

**Discovery requests must be made at such time that responses thereto are due before the discovery deadline, and the party requesting discovery has sufficient time (three days or more) to draft and file a Motion to Compel, if necessary. For example, if the time for response to a discovery request under the appropriate rule is 30 days, the discovery**

**request must be made at least 33 days before the discovery deadline.**

**Motions to Compel Discovery may be filed at any time prior to the discovery deadline. The Court will consider such motions even if the opposition memorandum and reply are filed after the deadline. Pursuant to the Federal and Local Rules of Civil Procedure, the parties must exhaust all extrajudicial means of resolving their discovery dispute before filing a Motion to Compel Discovery; such extrajudicial means must be set forth in an affidavit attached to the motion.**

**The Court will only entertain deposition disputes where the deposition is noticed, and also scheduled to occur, prior to the discovery deadline.**

### **3. Extending the Discovery Deadline:**

**Motions to extend the discovery deadline will only be considered if filed prior to expiration of the current discovery deadline.**

**The filing of a dispositive motion does not toll the running of the discovery deadline. Discovery will not be stayed during the pendency of a dispositive motion unless there are exceptional circumstances.**

### **4. Oral Argument:**

**It is the Court's usual practice to hear oral argument on the merits of discovery motions. Where litigation costs can be saved, the Court is willing to hear argument by telephone (a court reporter will be present in chambers).**

### **III. DISCLOSURE OF WITNESSES PRIOR TO THE DISCOVERY DEADLINE**

All witnesses to be called during a party's case-in-chief must be disclosed within sufficient time to permit discovery. Unless otherwise ordered, plaintiff will disclose to defendant the names of all expert witnesses at least sixty (60) days prior to the Discovery Deadline; defendant will disclose to plaintiff the names of all expert witnesses at least forty-five (45) days prior to the Discovery Deadline; and both parties will disclose the names of all other case-in-chief witnesses at least thirty (30) days prior to the Discovery Deadline. No additional witnesses may be listed in the Final Pretrial Order except by permission of the Court. Witnesses whose testimony is limited to rebuttal of an opponent's case need not be listed.

### **IV. CONFERENCES**

Counsel may, at any time, request a conference and such request will be granted. The parties may, at any time, request a settlement conference and one will be promptly scheduled.

#### **1. Status Conferences:**

Counsel or pro se litigants may, at any time, request a status conference, and such request will be granted.

#### **2. Informal Discovery Conferences:**

The parties may, at any time, request that an informal discovery conference be held by telephone pursuant to S. D. Ohio L. R. 37.1. Because such conferences are informal, and no discovery motion is pending, the Court will not issue a ruling; instead, the Court will recommend how the parties should resolve their discovery dispute.

### **3. Settlement Conferences:**

The parties may, at any time, request a settlement conference, and one will be promptly scheduled.

## **V. DISPOSITIVE MOTIONS PRACTICE**

### **1. When Motions May Be Filed:**

Dispositive motions may be filed at any time prior to the dispositive motions deadline. The Court will consider such motions even if the opposition memorandum and reply are filed after the deadline.

### **2. Oral Argument:**

Oral argument on motions to dismiss or for summary judgment will not be scheduled unless a party makes such a request pursuant to S.D. Ohio L.R. 7.1(b)(2).

### **3. Amending the Dispositive Motions Deadline:**

Motions to amend the dispositive motions deadline will only be considered if filed prior to the current dispositive motions deadline.

### **4. Briefs and Memoranda:**

Counsel are reminded of S.D. of Ohio L.R. 7.2(a)(3), which provides:

#### **Limitations Upon Length of Memoranda**

Memoranda in support of or in opposition to any Motion or application to the Court should not exceed twenty (20) pages. In all cases in which memoranda exceed twenty (20) pages, counsel must include an abbreviated introductory summary of all points raised and of the primary authorities relied upon in the memorandum. No such summary may exceed fifteen (15) pages.

## **VI. FOREIGN COUNSEL**

**Counsel admitted to practice before any United States District Court may, upon motion, be admitted in the Southern District of Ohio for purposes of representation in a specific case. Such permission will be conditional only and may be withdrawn at any time for failure to observe the rules of this district and the general Orders of this Court. Foreign counsel must fully comply with the provisions set forth in S.D. Ohio L. Rule 4.3.**

## **VII. ATTORNEY S FEES**

Any party who intends to apply to the Court for the payment of his or her attorney's fees by an opposing party shall file successive applications every 120 days indicating the legal services rendered and the amount charged to date. These applications shall be filed in accordance with the Federal and Local Rules of Civil Procedure and shall be served upon all parties. Failure to file any one of the applications shall be considered a release of the opposing party from the payment of such fees.

The Court shall consider a party's successive applications for attorney fees after a verdict or judgment has been rendered, and shall limit its consideration to the reasonable compensation for the necessary services rendered and the reasonable and necessary expenses incurred by one trial attorney in the case. Absent extraordinary circumstances, fees for all other services including, but not limited to, services rendered by co-counsel, shall not be chargeable to the opposing party, but shall be the sole responsibility of the party on whose behalf the services were rendered.

## **VIII. JURY VOIR DIRE**

If the parties desire the Magistrate Judge to conduct jury voir dire in their civil case, they must so jointly consent in writing. In such cases, counsel will be permitted to conduct the voir dire after preliminary questions by the Magistrate Judge. The entire panel of prospective jurors (i.e., those seated inside and outside of the jury box), will be examined in one continuous examination. Counsel will be provided with a list of the jurors names and numbers prior to the commencement of trial. Counsel are encouraged to obtain the jurors questionnaires from the Clerk of Courts three days before trial.

In civil cases, eight jurors will be seated in the jury box. Pursuant to Fed. R. Civ. P. 48, all eight jurors will deliberate.

Counsel must address their questions to the entire panel in general, and may not question an individual juror, unless justified. Counsel will not be permitted to questions jurors individually regarding background information, as this information is contained in the questionnaires. Counsel may inquire regarding any omission in a juror s answer to the questionnaire or, after obtaining the Court s permission, regarding any inquiry justifiably elicited by information contained in the questionnaire.

### **1. Challenges to the Jury Panel:**

The entire panel may be challenged for cause. This will be conducted outside the presence of the jury at the conclusion of the voir dire examination. The Court may suggest that a certain juror or jurors be challenged for cause. Counsel may, of course, agree or disagree and may raise an additional challenge or challenges for cause.

### **2. Peremptory Challenges:**

Peremptory challenges will be exercised simultaneously, in writing, by all counsel (including peremptory challenges to alternate jurors) during a recess



of the proceedings. The Courtroom Deputy will receive and combine the written peremptory challenges, and seat the jury as ultimately selected. Counsel will ordinarily be permitted fifteen minutes for this process. **The Court will assign four peremptory challenges to each side.**

## **CONSENT CASES ONLY**

**The following instructions concern the final pretrial conference and trial procedure where parties jointly consent to entry of Final Judgment by a Magistrate Judge.**

### **IX. FINAL PRETRIAL CONFERENCE**

Within approximately one month prior to trial, a final pretrial conference will be held. The date of such conference will be set forth in the Calendar Order.

Counsel are directed to submit a joint Final Pretrial Order directly to the Magistrate Judge at least three (3) days prior to the final pretrial conference. The Final Pretrial Order shall be in the form set forth in **the Appendix** to this trial preparation packet.

Trial counsel must attend the Final Pretrial Conference. No attorney may act as trial counsel who has not attended the final pretrial conference, unless permission of the Court is granted.

Prior to the final pretrial conference, counsel for each of the parties will assemble all exhibits to be used at the trial and make available to opposing counsel either the original exhibits or copies thereof. It is not necessary to bring exhibits to the final pretrial conference or to file them with the Court prior to trial. Counsel are required, however, to list all exhibits in the Final Pretrial Order.

The following procedure will be **used** for marking exhibits:

1. Plaintiff's exhibits will be identified by numbers in sequence, starting with **1**; each number will be preceded with the letter "P."
2. Defendant's exhibits will be identified by numbers in sequence, starting with **1**; each number will be preceded with the letter "D."
3. Joint exhibits will be identified by numbers in sequence, starting with **1**; each number will be preceded with the letter "J."
4. Additional party's exhibits will be identified by numbers in sequence, starting with **1**; each number will be preceded with the party's initial.

Exhibits will be placed in binders and each exhibit will be tabbed. Trial exhibits will remain in the custody of the Courtroom Deputy Clerk during the trial. At least **four** sets of bound and tabbed exhibits are necessary: one for trial exhibits; one copy for the Court; one copy for opposing counsel; **and one copy for the Judge's law clerk**. Counsel may wish to prepare a **fifth** set of exhibits for the use of the jury, if applicable.

Objections to the admissibility of **evidence** may be made by written motion prior to trial. Ordinarily, rulings on the admissibility of evidence will be made during the trial.

## **X. REQUESTED JURY INSTRUCTIONS**

Agreed requests for jury instructions must be submitted to the court at least seven (7) days prior to trial. Only in the event that counsel cannot agree will separate instructions be accepted. Each requested instruction must be numbered and presented on a separate 8 ½" x 11" sheet of paper. In addition to written instructions, the parties may submit instructions on disc in Word Perfect 6.1 format. Requested instructions must contain a citation of authority upon which counsel relies. Requested instructions that do not contain such citations will be rejected.

The Court uses as sources for charges, among others, Devitt and Blackmar's FEDERAL JURY PRACTICE AND INSTRUCTIONS, **and** OHIO JURY INSTRUCTIONS. The Court is bound by determinations of the Supreme Court of the United States and the United States Court of Appeals for the Sixth Circuit. Where appropriate, determinations by the Supreme Court of Ohio, or in the absence thereof, determinations by the Ohio Courts of Appeals will be deemed binding.

## **XI. TRIALS**

### **1. Findings of Fact and Conclusions of Law:**

In trials to the Court (**i.e., bench trials**), counsel **shall** file Findings of Fact and Conclusions of Law which **they** believe the Court should make. **In trials scheduled to last two days or less, the proposed Findings of Fact and Conclusions of Law shall be filed on the first day of trial. In all other cases - that is, where trial is expected to last three or more days - the proposed Findings of Fact and Conclusions of Law shall be filed within ten (10) days of the conclusion of trial. If trial transcript citations will be relevant to the Court's decision, the Court is amenable to extending the ten-day deadline, upon motion of either party, to ten days after the parties receipt of the trial transcript.**

### **2. Court Sessions:**

**Trials will start promptly at 9:00 a.m. The morning session will continue until approximately noon. The afternoon session will start one and one-half hours after the end of the morning session and will end at approximately 5:00 p.m. There will be a morning recess at approximately 10:45 a.m., and an afternoon recess at approximately 3:00 p.m.**

**It is expected that the parties and all counsel will be seated at the counsel tables prior to the above times when the Court is called into session.**

### **3. Counsel Tables:**

Plaintiff in all civil cases and the United States in all criminal cases will occupy the counsel table near the jury box. The defendant in both civil and criminal cases will occupy the counsel table farthest from the jury box. Additional or separate tables will be provided upon request for multiple plaintiffs, defendants, or third parties.

### **4. Jury Voir Dire**

**See §8, supra.**

### **5. Presentation of the Case:**

There are no specific rules governing the manner of interrogation, addresses by counsel and presentation of exhibits. Counsel may present their case in the style with which they are comfortable, so long as they do so in a dignified and respectful manner and abide by the Code of Professional Responsibility.

### **6. Jury Instruction Conference:**

Prior to summation in jury cases, the Court will hold a conference with counsel, in chambers **and** on the record, for the following purposes: The Court will have prepared a draft jury charge, which will be discussed in detail with counsel. Objections may be made at this time, and the Court may then modify the jury charge. Counsel will know, before closing arguments, the final composition of the charge. The Magistrate Judge prefers to charge the jury after closing arguments.

Counsel and the Court will determine the length of closing arguments. Plaintiff's counsel must use at least half of the allotted time in opening argument, and must use closing argument only to rebut defendant's closing argument.

## **XII. APPENDIX**

### **Final Pretrial Order Format**

Final Pretrial Order following this format must be jointly prepared and submitted by counsel to the Magistrate Judge at least three (3) days prior to the date of the Final Pretrial Conference:

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

xxx

Plaintiff(s)

vs

Civil Case No.

xxx

Defendant(s)

**FINAL PRETRIAL ORDER**

This matter came before the Court at a Final Pretrial Conference held on \_\_\_\_\_ at \_\_\_\_\_, pursuant to Fed. R. Civ. P. 16.

**I. APPEARANCES:**

For Plaintiff:

For Defendant:

**II. NATURE OF ACTION AND JURISDICTION**

A. This is an action \_\_\_\_\_.

B. The jurisdiction of the Court is invoked under \_\_\_\_ **U.S.C. §** \_\_\_\_.

C. The jurisdiction of the Court is (is not) disputed.

D. The parties (have) (have not) consented to entry of final judgment by the United States Magistrate Judge.

**III. TRIAL INFORMATION**

A. The estimated length of trial \_\_\_\_\_ is days.

B. Trial to (the court) (the jury) has been set for

#### IV. **AGREED STATEMENT AND LISTS:**

##### A. General Nature of the Parties' Claims

###### (1) PLAINTIFF CLAIMS:

(suggested type of simple language)

"Plaintiff asserts in Count 1 a right of recovery for defendant(s) negligence as follows:"

"Plaintiff asserts in Count 2 a right of recovery for defendant(s) wanton and willful misconduct as follows:"

"Plaintiff asserts in Count 3 a right to punitive damages and attorney fees for the following reasons:"

###### (2) DEFENDANT CLAIMS:

(suggested type of simple language)

"Defendant denies liability as asserted in Counts for the following reasons:"

"Defendant, as an affirmative defense, asserts that plaintiff was contributorily negligent as follows:"

"Defendant, as an affirmative defense, asserts that plaintiff's claims are outlawed by the Statute of Limitations for the following reasons:"

###### (3) ALL OTHER PARTIES' CLAIMS:

##### B. Uncontroverted Facts

Suggested language:

The following facts are established by admissions in the pleadings or by stipulations of counsel (set forth and number uncontroverted or uncontested facts).

##### C. Issues of Fact and Law

Suggested language:

###### (1) "CONTESTED ISSUES OF FACT: The contested issues of fact remaining for decision are:" (list)

- (2) "CONTESTED ISSUES OF LAW: The contested issues of law in addition to those implicit in the foregoing issues of fact are:" (set forth)

OR

"There are no special issues of law reserved other than those implicit in the foregoing issues of fact."

D. Witnesses

Suggested language:

- (1) "Plaintiff will call or will have available for testimony at trial those witnesses listed on Appendix A hereof."
- (2) "Defendant will call or will have available for testimony at trial those witnesses listed on Appendix B hereof."
- (3) "\_\_\_\_\_ will call or will have available for testimony at trial those witnesses listed on Appendix C hereof."
- (4) "The parties reserve the right to call non-listed rebuttal witnesses whose testimony could not reasonably be anticipated without prior notice to opposing counsel."

INSTRUCTIONS: Leave to call additional witnesses may be granted by the Court in unusual situations. Counsel seeking such leave must file a Motion to Add Witnesses and serve a copy upon opposing counsel with names, addresses, and an offer of proof of such witness's testimony at least five (5) days prior to trial.

E. Expert Witnesses

Suggested language:

"Parties are limited to the following number of expert witnesses, including treating physicians, whose names have been disclosed to opposing counsel:

Plaintiff

Defendant



F. Exhibits

The parties will offer as exhibits those items listed herein as follows:

- (1) Joint Exhibits - Appendix D
- (2) Plaintiff Exhibits - Appendix E
- (3) Defendant Exhibits - Appendix F
- (4) Third-Party Exhibits - Appendix G

G. Depositions

Suggested language:

"Testimony of the following witnesses will be offered by deposition/video tape;"

OR

"No testimony will be offered by deposition/video tape."

INSTRUCTIONS: Depositions must be filed by the time of Final Pretrial Conference with the portions to be read noted therein. An opportunity will be given to opposing counsel to read any omitted portion. Counsel will be notified at trial of rulings on all objections.

H. Discovery

Suggested language:

"Discovery has been completed.";

OR

"The following provisions have been made for discovery."

I. Pending Motions

Suggested language:

"The following motions are pending at this time:"

OR

"There are no motions pending at this time."

J. Miscellaneous Orders

INSTRUCTIONS: Set forth any orders not properly includable elsewhere.

**V. MODIFICATION**

Suggested language:

"This Final Pretrial Order may be modified at the trial of this action, **or prior** thereto, to prevent manifest injustice. Such modification **may** be made by application of counsel, or on motion of the Court."

**VI. SETTLEMENT EFFORTS**

Suggested language:

"The parties have made a good faith effort to negotiate a settlement."

OR

"Settlement negotiations are still ongoing at this time."

**VII. PROPOSED INSTRUCTION - TRIAL TO A JURY**

Pursuant to section **IV** of this trial packet, Jury Instructions are to be submitted seven (7) days prior to trial.

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UNITED STATES MAGISTRATE JUDGE

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Counsel for Plaintiff (or **Plaintiff, if pro se**)

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Counsel for Defendant (or **Defendant, if pro se**)

PLAINTIFF'S WITNESSES

NAME

ADDRESS

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## DEFENDANT'S WITNESSES

NAME

ADDRESS


THIRD PARTY WITNESSES

NAME	ADDRESS

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## **APPENDIX G**

EXHIBITS OF \_\_\_\_\_

(Use numbers prefixed by initial of party)